2007

Utah State Retirement Board, Public Employees' Health Program v. Kelly and Rose Kramer : Brief of Appellant

Utah Court of Appeals

David B. Hansen; Howard Phillips & Andersen; Counsel for Appellees.
John F. Fay; Gregory & Swapp; Counsel for Appellants.

UTAH COURT OF APPEALS

UTAH STATE RETIREMENT BOARD, PUBLIC EMPLOYEES' HEALTH PROGRAM, **Petitioners/Appellees,** **Vs.** **KELLY & ROSE KRAMER,** **Respondents/Appellants.**	**APPELLANTS' OPENING BRIEF** **Case No.: 2007-0762** **[File No.: 06-07H]** **[Hearing Officer: Howe]**

COUNSEL for APPELLEES-

DAVID B. HANSEN, Esq. USB-8197
Howard Phillips & Andersen
Suite 300
560 East 200 South
Salt Lake, UT 84102
Tel.: 801-366-7471

COUNSEL for APPELLANTS-

JOHN F. FAY, Esq., USB- 5691
Gregory & Swapp
Suite 300
2975 West Executive Parkway
Lehi, UT 84043
Tel.: 801.990.1919

UTAH COURT OF APPEALS

UTAH STATE RETIREMENT BOARD, PUBLIC EMPLOYEES' HEALTH PROGRAM,	**APPELLANTS' OPENING BRIEF**
Petitioners/Appellees,	**Case No.: 2007-0762**
Vs.	
KELLY & ROSE KRAMER,	**[File No.: 06-07H]**
Respondents/Appellants.	**[Hearing Officer: Howe]**

COUNSEL for APPELLEES-

DAVID B. HANSEN, Esq. USB-8197
Howard Phillips & Andersen
Suite 300
560 East 200 South
Salt Lake, UT 84102
Tel.: 801-366-7471

COUNSEL for APPELLANTS-

JOHN F. FAY, Esq., USB- 5691
Gregory & Swapp
Suite 300
2975 West Executive Parkway
Lehi, UT 84043
Tel.: 801.990.1919

Page

PARTIES- ii

TABLE OF CONTENTS- ii

TABLE OF AUTHORITIES-..... iii

JURISDICTIONAL STATEMENT-..... vi

STATEMENT OF ISSUES & STANDARD OF REVIEW- vi

CONSTITUTIONAL OR STATUTORY PROVISIONS-.... xiii

STATEMENT OF CASE-..... xiii

STATEMENT OF FACTS-..... xiv

SUMMARY OF ARGUMENTS-..... xx

ARGUMENTS-..... 1

CONCLUSION-..... 32

PROOF OF SERVICE-..... 36

ADDENDUM-.....There is no addendum.

PARTIES-

Appellants are husband and wife. Kelley Kramer was a Utah Highway Patrolman and both he and his wife, Rose, were insured under Appellee's Public Employees Health Plan.

Appellee is the State Retirement Board's, Public Employees Health Plan. It provided health insurance to Appellants.

TABLE OF CONTENTS-

	Page
Table of Authorities-.....	**iii**
Jurisdictional Statement-.....	**vi**
Statement of Issues & Standard of Review-	**vi**
Constitutional or Statutory Provisions-.....	**xiii**
Statement of Case-.....	**xiii**
Statement of Facts-.....	**xiv**
Summary of Arguments-.....	**xx**
Arguments-.....	**1**
Conclusion-.....	**32**
Proof of Service-.....	**36**
Addendum-.....There is no addendum.	

TABLE OF AUTHORITIES-

Page

Statutes-

U.C.A., 31A-21-106(1),..... 24

U. C. A., 49-11-101,..... 16

U. C. A., 49-11-102,..... 29

U. C. A, 49-11-301(3),..... 31

U. C. A., 49-11-613, ... 16, 22, 23, 28, 30, & 31

U. C. A., 49-20-401(e),..... 22, 31

Rules-

U. R. C. P. Rule 56 (b) & (c), ... VIX, X, 27

Case Law-

Allstate v. Worthington, 46 F3d 1005, [10th Cir. 1995],..... **21**

Aurora Credit Services v. Liberty West Dev, 970P.2d1273[Utah, 1998] **9,10,34**

Barker v. UT Public Serv. Comm., 970 P.2d 702, (UT., 1998),..... **22**

Bill Brown Realty v. Abbott, 652 P.2d 238 [Utah, 1977];..... **7**

Blue Cross Blue Shield v. State, 779 P.2d 634 [Utah, 1989];..... **VIX**

Bornhart v. Civil Service, 398 P.2d 873, 877 [Utah 1976],..... **25**

Boyer Co., v, Lignell, 567 P.2d 1112, [Utah, 1977],..... **9**

Bridge v. Backman, 353 P.2d 909 [Utah, 1990];..... **16**

Briggs v. Holcomb, 740 P.2d 281 [Ut. App., 1987]; ..... **VIX**

Bright v. Westmorland County, 380 F.3d 729,[U.S.D.C., 3rd Cir., 2004],.. **11**

Campbell v. Campbell, 896 P.2d 635, [Ut. Ct. App., 1995].....**XII, 1, 12, 34**

Christopher v. Larson Ford, 557 P.2d 1009, 1012 [Utah, 1976],..... **25**

Colonial Leasing v. Larsen Bros. Const., 731 P.2d 483 [Utah, 1986],... **32**

Cullum v. Farmers, 857 P.2d 992 [Utah, 1993],..... **24**

Draughton v. CUNA Mut. Ins. Soc'y, 771 P.2d 1105 [Utah App. 1989]; **21**

Falkner v. Farnsworth, 665 P2d 1292, [UT 1983],..... **20**

Farmers Ins. Exchange v. Call, 712 P.2d 131, [Utah, 1985],..... **22**

Frederick May Co. v. Dunn, 368 P.2d 266 [Utah, 1962]; **33**

Grossen v. DeWitt, 369 Ut. Adv. Rpt. 31,[Ut. Ct. App., 1999];..... **X, XII**

Harmon City v. Nielson & Senior, 907 P.2d 1162, [Utah, 1995];..... **31**

Higgins v. Salt Lake County, 855 P.2d 231, [UT., 1993]; ..... **VIX, X, XII**

Hill v. St. Farm, 765 P2d 864 (1988),..... **22, 23**

Jeffs v. Stubbs, 970 P.2d 1234 [Utah, 1998] cert denied; ..... **X, XI**

Johnson v. Higley, 977 P.2d 1209 [Ut. Ct. App., 1999]; ..... **X**

Judkins v. Toone, 492 P.2d 980 [Utah, 1972],..... **33**

Krantz v. Holt, 819 P.2d 352 [Utah, 1991],..... **16**

Larson v. Park City, 955 P.2d 343 [Utah, 1998]; ..... **VIX, X**

McCoy v. Blue Cross – Blue Shield, 980 P.2d 694, (UT App. 1999),. **21, 24**

Morris v. Farnsworth Motel, 259 P.2d 297 [Utah, 1953]; **27**

Mountain States Tel.&Tel. v. Garfield County, 811P.2d184[Utah, 1991] **27**

Neel v. State, 889 P.2d 922,[Utah, 1995],..... **31**

Neiderhauser Bldrs. & Dev. v. Campbell, 824P.2d1193[Ut. App., 1992]; **27**

Pennington v. Allstate, 973 P.2d 932 [Utah, 1998]; ..... **X, XI**

Prows v. Hawley, 271 P. 31,[Utah, 1928]; **14**

Quaid v. U.S. Healthcare, Ad. Rep., 2007 [Utah] 27,..... **20**

Reeves v. Geigy Pharm., 764 P.2d 636 [Ut. App., 1988]; ..... **VIX**

Rich v. McGovern, 551 P.2d 1266 [Utah, 1976];..... **15**

Rucker v. Dalton, 598 P.2d 1336 [Utah, 1979]; **14, 34**

Salt Lake City v. James Construction, 761 P.2d 42 [Ut. App. 1998];**VIX, X**

Sandberg v. Klein, 576 P.2d 1291, [Utah, 1978], ... **19, 26**

Sorenson v. Beers, 585 P.2d 458 [Utah, 1978];..... **33**

State v. All Real Property, 37 P.3d 276, [Utah Ct. App., 2001],..... **9**

State ex. rel State, 928 P.2d 393 [Ut. Ct. App., 1996]; ..... **X, XII**

State v. 663 E. 640 No., 942 P.2d 925 [Utah, 1997]; **14**

St. Farm v. Northwest Nat'l Ins., 912 P.2d 983, (Utah 1996),..... **26**

State v. Ferree, 784 P.2d 149 [Utah, 1998]; .....**VIX, X**

State v. Pena, 869 P.2d 932 [Utah, 1994]; ..... **VIX, X**

Stewart v. UT Public Serv. Comm., 885 P.2d 759 (UT. 1994),..... **22**

Sulzen v. Williams, 977 P.2d 497[Ut. Ct. App., 1999]; ..... **VIX, X**

Transamerica Ins. v. Barnes, 505 P.2d 783, [Utah, 1972],..... **26**

U. S. Fidelity v. Sandt, 854 P.2d, 519, [Utah, 1993],..... **21**

Young v. Young, 979 P2d. 338 [Utah, 1999]; .....**XI, 13**

Wagner v. Farmers Insurance, 786 P.2d 763; [Utah Ct. App., 1990], **25**

Williamson v. Williamson, 372 Ut. Adv.Rpt. 45 [Ut. Ct. App., 1999]; **X, XII**

Woodard v. Fazzio, 923 P.2d 474 [Ut. Ct. App., 1991]; ..... **XII, 1, 13**

JURISDICTIONAL STATEMENT-

U.C.A., 78-2a-3(2)(a) confers jurisdiction of this appeal on a final order from a formal adjudicative proceeding of a state agency on the Utah Court of Appeals.

STATEMENT OF ISSUES & STANDARDS OF REVIEW-

No. 1- **Did the Hearing Officer err in granting summary judgment by not setting forth the reasons supporting his grant of summary judgment?**

Preservation of Issue:
Appellants disputed, material facts included that the subrogation policy provisions: were unenforceable in that they:

A- **were ambiguous** in failing to define several material, technical terms. **Record,** @ 92, 94-97, 104-106, 275-282, Hearing Transcript, @ 347, pages 9-10, & 12-15.

B- **were not set forth in clear language** readily understandable by the average purchaser of insurance.

Record, @ 93-96, 104, 276-278, 280-283, Hearing Transcript @ 347, pages 10, 12-15, & 17.

C- **violated Utah's "common fund" doctrine?**

Record, @ 102-104, 283, Hearing Transcript @ 347, pages 13-14.

D- **were contained in the Plan's "Master Policy"** that **Appellee never Presented to Appellants?**

Record, @ 92, 96-97, 103-106, 272-274, 279, 281, 286-288, Hearing Transcript @ 347, pages 9-10

E- were **invalidly incorporated by reference into the Enrollment Form,** the Appellants' insurance contract with Appellee.

Record, @ 80 @ **Exhibit "B",** Section C, 103, 104, 272-274, 276, 284, 286-288, - Hearing Transcript @ 347, pages 9-10, .

F- **contained in an adhesion contract.**

Record, @ 96, 106, 195, 276, Hearing Transcript @ 347, pages 12-13 & 17.

G- **were hidden deeply in the policy.**

Record, @ 21-22, 104, 279.

H- **became operative automatically.**

Record, @ 21, 100, 104, 279]

Appellants further argued that Appellee:

I- **had no standing** to bring its Petition for a Declaratory Judgment.

Record, @ 92-93, 106, 284, Hearing Transcript @ 347, pages 8-12.

J- **should have been required to show that Appellant Rose Kramer was "made whole"** by her settlements.

Record, @ 93-94, 97-99, 104, 282, Hearing Transcript @ 347, pages 15-16.

K- **could not show that Appellants knowingly waived** their "made whole" doctrine rights.

Record, @ 98, 101, 159, 283, Hearing Transcript @ 347, pages 11-12, & 15-17.

L- **had not given Appellants proper notice** of the policy's terms and limitations.

Record, @ 272-273, 284, 286-288, Hearing Transcript @ 347, pages 12-13.

And that:

M- to enforce the subrogation provision would result in:

a- **Appellee receiving a "double recovery."**

Record, 101-102, 104, 276, 278, 279, 283, 289, Hearing Transcript @ 347, pages 13-14.

b- **a violation of the Appellants' "reasonable expectations."**

Record, @ 281-282, 286-288, Hearing Transcript, @ 347, page 16.

And,

c- **Appellants suffering a grave financial injustice.**
Record, @ 105, 283-284

The standard for review is that a party's entitlement to a summary judgment is a question of law. Thus, the reviewing court looks for "correctness" and views the

facts in a light most favorable to the losing party and in doing so it accords no deference to the trial court's rulings.

Higgins v. Salt Lake County, 855 P.2d 231, 235 [UT., 1993]; **State v. Ferree,** 784 P.2d 149, 151 [Utah, 1998]; **Salt Lake City v. James Construction,** 761 P.2d 42, 45, [Ut. App. 1998]; **State v. Pena,** 869 P.2d 932 [Utah, 1994]; **U. R. C. P. Rule 56 (b), Larson v. Park City,** 955 P.2d 343, 345 [Utah, 1998]; **Sulzen v. Williams,** 977 P.2d 497, 500 [Ut. Ct. App., 1999]; **Themy v. Seagull Enters.,** 595 P. 2d 526, [Utah, 1979]; **Briggs v. Holcomb,** 740 P.2d 281 [Ut. App., 1987]; **Copper State Leasing v. Blacker Appliance,** 770 P.2d 88 [Utah, 1988]; **Reeves v. Geigy Pharm.,** 764 P.2d 636 [Ut. App., 1988]; **Neiderhauser Bldrs. & Dev. v. Campbell,** 824 P.2d 1193 [Utah App., 1992]; **Blue Cross Blue Shield v. State,** 779 P.2d 634 [Utah, 1989].

****

No. 2- Did the Hearing Officer err when he did not consider Appellants' arguments that all the facts needed to be viewed and understood from the contentions and consequences of those facts?

Preservation of Issue:
This is a legal mandate governing the trial court's decision making processes. It need not be preserved in the Record.

No. 3 **Did the Hearing Officer err in not viewing the facts and all reasonable inferences there from in a light favorable to Appellants?**

Preservation of Issue:
This is a legal mandate governing the trial court's decision making procedures. It need not be preserved in the Record.

This is a mixed question of law and fact. The appellate court review looks at the trial court's **factual findings** from a clearly erroneous standard, i.e., so lacking in support as to be against the clear weight of the evidence. **Young v.Young,** 979 P.2d 338, 342 [Utah, 1999] ; **Pennington v. Allstate,** 973 P.2d 932, 937 [Utah, 1998]; **Grossen v. DeWitt,** 369 Ut. Adv. Rpt. 31, 32 [Ut. Ct. App., 1999]; **Johnson v. Higley,** 977 P.2d 1209, 1214 [Ut. Ct. App., 1999]; **Jeffs v. Stubbs,** 970 P.2d 1234, 1242 [Utah, 1998] cert denied; **State v. 663 E. 640 No.**, 942 P.2d 925, 931 [Utah, 1997]; **Williamson v. Williamson,** 372 Ut. Adv. Rpt. 45, 46 [Ut. Ct. App., 1999] **Woodard v. Fazzio,** 923 P.2d 474, 477 [Ut. Ct. App., 1991]; **State ex. rel State,** 928 P.2d 393, 398 [Ut. Ct. App., 1996]; **Rucker v. Dalton,** 598 P.2d 1336, 1338 [Utah, 1979]; **Campbell v. Campbell,** 896 P.2d 635, 638-639 [Ut. Ct. App., 1995].

The standard for review to a challenge of the trial court's **conclusions of law** finds the reviewing court looking for "correctness" and accords no deference to the trial court's rulings. **Higgins v. Salt Lake County,** 855 P.2d 231, 235 [UT., 1993];

State v. Pena, 869 P.2d 932, [Utah, 1994]; **State v. Ferree,** 784 P.2d 149, 151 [Utah, 1998]; **Salt Lake City v. James Construction,** 761 P.2d 42, 45, [Ut. App. 1998]; **State v. Pena,** 869 P.2d 932 [Utah, 1994]; **U. R. C. P. Rule 56 (b), Larson v. Park City,** 955 P.2d 343, 345 [Utah, 1998]; **Sulzen v. Williams,** 977 P.2d 497, 500 [Ut. Ct. App., 1999];

No. 4- Did the Hearing Officer err in finding that Appellee had standing to bring its Request for a Declaratory Judgment?

Preservation of Issue:
Record, @ 284, Hearing Transcript @ 347, pages 8-11

This is a mixed question of law and fact. The appellate court review looks at the trial court's **factual findings** from a clearly erroneous standard, i.e., so lacking in support as to be against the clear weight of the evidence. **Young v.Young,** 979 P.2d 338, 342 [Utah, 1999]; **Pennington v. Allstate,** 973 P.2d 932, 937 [Utah, 1998]; **Grossen v. DeWitt,** 369 Ut. Adv. Rpt. 31, 32 [Ut. Ct. App., 1999]; **Johnson v. Higley,** 977 P.2d 1209, 1214 [Ut. Ct. App., 1999]; **Jeffs v. Stubbs,** 970 P.2d 1234, 1242 [Utah, 1998] cert denied; **State v. 663 E. 640 No.**, 942 P.2d 925, 931 [Utah, 1997]; **Williamson v. Williamson,** 372 Ut. Adv. Rpt. 45, 46, [Ut. Ct. App., 1999] **Woodard v. Fazzio,** 923 P.2d 474, 477 [Ut. Ct. App., 1991]; **State ex. rel ST,** 928 P.2d 393, 398 [Ut. Ct. App., 1996]; **Rucker v. Dalton,** 598 P.2d

1336, 1338 [Utah, 1979]; **Campbell v. Campbell,** 896 P.2d 635, 638-639 [Ut. Ct. App., 1995].

The standard for review to a challenge of the trial court's **conclusions of law** finds the reviewing court looking for "correctness" and accords no deference to the trial court's rulings. **Higgins v. Salt Lake County,** 855 P.2d 231, 235, [UT., 1993]; **State v. Pena,** 869 P.2d 932, [Utah, 1994].

The appellate court review looks at the trial court's **factual findings** from a clearly erroneous standard, i.e., so lacking in support as to be against the clear weight of the evidence. **Young v. Young,** 979 P.2d 338, 342 [Utah, 1999] ; **Pennington v. Allstate,** 973 P.2d 932, 937 [Utah, 1998]; **Grossen v. DeWitt,** 369 Ut. Adv. Rpt. 31, 32, [Ut. Ct. App., 1999]; **Johnson v. Higley,** 977 P.2d 1209, 1214, [Ut. Ct. App., 1999] ; **Jeffs v. Stubbs,** 970 P.2d 1234, 1242 [Utah, 1998] cert denied; **State v. 663 E. 640 No.**, 942 P.2d 925, 931 [Utah, 1997]; **Williamson v. Williamson,** 372 Ut. Adv. Rpt. 45, 46, [Ut. Ct. App., 1999]; **Woodard v. Fazzio,** 923 P.2d 474, 477 [Ut. Ct. App., 1991]; **State ex. rel State,** 928 P.2d 393, 398 [Ut. Ct. App., 1996]; **Rucker v. Dalton,** 598 P.2d 1336, 1338 [Utah, 1979]; **Campbell v. Campbell,** 896 P.2d 635, 638-639 [Ut. Ct. App., 1995].

****

CONSTITUTIONAL OR STATUTORY PROVISIONS-

U. C. A. 31A-21-106,

U. C. A., 49-11-101,

U. C. A., 49-11-102,

U. C. A., 49-11-613,

U. C. A., 49-20-401(e),

STATEMENT OF CASE-

Respondent/Appellants are insureds under Utah's State Retirement Board's [Petitioners' & Appellees'] "Public Employees' Health Plan", **[PEHP].**

After a motor vehicle crash, PEHP paid some of Appellant ROSE KRAMER's medical bills. Later, Rose Kramer secured a settlement of the adverse driver's $100,000 liability policy limit. Subsequently, PEHP demanded 100% reimbursement for the medical bills it paid in Appellants' behalf. PEHP paid a bit over $30,000 for Appellant Rose Kramer's medical bills. Appellees demanded full reimbursement under the "subrogation provisions" of the PEHP.

Appellants declined to pay any reimbursement believing the subrogation provisions of the PEHP were unenforceable for a variety of legal and factual reasons. The State Retirement Board via PEHP then filed a "Request For

Declaratory Judgment." Appellants formally opposed this Request. The State Retirement Board appointed the honorable, RICHARD C. HOWE, as the Hearing Officer to preside over the claim. Discovery commenced.

Later, Appellees filed for a summary judgment arguing in a summarily and conclusionary way that it was entitled to summary judgment as a matter of law because there was no genuine issues of material fact between the parties. Appellants opposed the Motion with formal "points and authorities." Appellees filed formal reply points and authorities.

In late July, 2007, the parties argued their respective positions before the Hearing Officer. He took the matter under advisement and on 07/30/07, issued his "Ruling" granting Appellees summary judgment.

Appellants appeal from the grant of summary judgment.

STATEMENT OF FACTS-

At all relevant times, Respondent/Appellant KELLY KRAMER was a Utah Highway Patrol Officer and enrolled in the Public Employee's Health Plan [PEHP]. Respondent/Appellant ROSE KRAMER was his spouse and an insured under the PEHP. On or about September 29, 2001, ROSE KRAMER was involved

in a motor vehicle crash wherein she suffered significant injuries. In that motor vehicle crash, Rose Kramer, then 38 years old, suffered:

A- a tri-level anterior cervical discectomy;
B- a post surgical 25% to 28% whole person impairment;

C- a 15% to 27% future loss of earnings;
D- about $50,000 in medical bills;

E- about $10,000 in costs in prosecuting her claims against the tortfeasor; and,

F- in excess of $500,000 in past and future special damages.

In full settlement of her crash injuries, Rose Kramer received the liability policy limit of $100,000 from the at-fault driver and another $10,000, the policy limit, under her UIM coverage. **[Record**, @ 92-93, 106, Hearing Transcript @ 347, page 13]

During the recovery phase of her injuries, Petitioners / Appellees PEHP paid approximately $30,000 in medical benefits. It did not however, pay all the medical bills generated in the care and treatment of Rose Kramer's crash injuries. Subsequently, PEHP demanded 100% reimbursement for the monies it paid in medical care benefits.

Appellants refused to pay any money to PEHP arguing that under the law, they believed that PEHP was not entitled to any reimbursement.

Appellees PEHP then filed a **Request for Declaratory Judgment** with the Utah State Retirement Board. **Record**, @ 1-88 Appellants opposed it. **Record,** @ 92-107 The Board assigned the Honorable Richard C. Howe as the Hearing Officer. Discovery commenced.

Later, Appellees filed a summary judgment motion. **Record,** @ 228-259 Appellants opposed it. **Record,** @ 272-287 On 07/10/07, Hearing Officer Howe presided over a hearing on the summary judgment motion, took it under advisement and subsequently granted it.

In opposing the summary judgment motion, Appellants made numerous factual and legal arguments that properly should have precluded summary judgment. But the Hearing Officer "summarily" found no genuine issues of material fact notwithstanding that Appellants had set forth several, contested, material factual issues. Further, the Hearing Officer adopted many of Appellee's positions notwithstanding the many, controverted material "facts" Appellants had pled. **Record,** @ 334

Additionally, Appellants asserted that the Public Employees Health Plan:

1- lack standing to bring its "Request for Declaratory Judgment."

[Record, @ 92-93, 106, 284, Hearing Transcript @ 347, pages 8-12]

2- that Rose Kramer was not "made whole" by her settlements, thus precluding the Plan from reimbursement.

[Record, @ 93-94, 97- 99, 104, 282, Hearing Transcript @ 347, pages 15-16]

And,

3- because PEHP never presented a copy of the Plan to Appellants it could not enforce its subrogation provisions.

[Record, @ 92, 96-97, 104-106, 279, 281, Hearing Transcript, @ 347 @ pages 9-10]

Appellants also contested that Appellees had no enforceable subrogation rights because the PEHP:

4- *was ambiguous* in the material "reimbursement/subrogation" provisions because the operative, material, technical terms were left undefined, and that properly resolving the ambiguity in Appellants' favor would deny the Plan any reimbursement.

[Record, @ 92, 94-97, 104-106, 275-281, Hearing Transcript, @ 347, pages 9-10, 12-15]

5- limited coverage by the subrogation provisions but this "limitation or exclusion" *was not set forth in clear language* readily understood by the average purchaser of insurance.

[Record, @ 93-96, 104, 276-278, 280-283, Hearing Transcript @ 347, pages 10, 12-15 & 17.]

6- had subrogation provisions that:

- were unenforceable because many operative, material terms were not defined.

  [Record, @ 92, 94-97, 104, 106, 275-282, Hearing Transcript @ 347, pages 9-10, 12-13]

- were hidden deeply in the policy. **[Record,** @ 21-22, 104, 279]

- became operative automatically. **[Record,** @ 21, 100, 104, 279]

- would give the PEHP a "double recovery."

  [Record, @ 101-102, 104, 276, 278-279, 283, 289, Hearing Transcript, @ 347, pages 13-14]

- violated Utah's "common fund" doctrine.

  [Record, @ 102-104, 283, Hearing Transcript @ 347, pages 13-14]

- would result in Appellants suffering an injustice.

  [Record, @ 105, 283-284,**]**

And,

- violated Utah's case law holdings of the "reasonable expectations" doctrine.

  [Record, @ 281-282, 286-288, Hearing Transcript @ 347, page 16]

7- By withholding/failing to produce the policy and by failing to define material, operative and technical terms, PEHP did not give proper notice to Appellants of the terms and limitations of the policy.

[Record, @ 272-273, 286-288, Hearing Transcript @ 347, pages 12-13]

8- was not the Appellants' "insurance contract." That is, Appellants signed the "Enrollment Form" which mentioned the PEHP but it did not have the PEHP attached. Thus, legally PEHP cannot enforce a document not attached to the contract/Enrolment Form.

[Record, @ 92, 96-97, 103-104, 272-274, 281, 286-288, Hearing Transcript, @ 347 @ pages 9-10]

9- that the Appellants did not make a knowing waiver of their "made whole" doctrine rights.

[Record, @ 98, 101, 283, Hearing Transcript @ 347, pages 11-12, 15-17]

And that,

10- Appellee's plan is an adhesion contract.

[Record, @ 96, 106, 195, 276, Hearing Transcript @ 347, pages 12-13, 17]

Though requested to do so, when the Hearing Officer granted the summary judgment he did not address the specific questions that were before him. His grant of summary judgment was absent any details or findings of fact or conclusions of

law on the multiple of issues before him. **[Record,** @ Ruling 322-323, Findings of Fact and Conclusions of Law, @ 336-339] Accordingly, Appellants appeal the 07/30/07 Ruling and the 08/20/07 Findings and the Hearing Officer's Orders that surrounding these administrative decisions.

****

SUMMARY OF ARGUMENTS-

No. 1- **Did the Hearing Officer err in granting summary judgment by not setting forth the reasons supporting his grant of summary judgment?**

Did he err in not finding any disputed issues of material fact from the many factual disputes Appellants presented to him?

Did he err in not offering any legal authority to support his grant of summary judgment?

The Hearing Officer found no genuine issues of material fact when Appellants had set forth many contested material factual issues. Further, the Hearing Officer relied upon, and adopted Appellees' positions notwithstanding the controverted "facts" Appellants pled. The single legal authority he did adopt is error because it does not stand for the finding he made under it.

The disputed, material facts Appellants had asserted were that:

1- Appellees lack standing to bring its Request for Declaratory Judgment,

2- Appellant Rose Kramer was not "made whole" by her settlements,

3- because Appellees never presented a copy of the Plan to Appellants it could not enforce its subrogation provisions;

4- the Plan was ambiguous in the material "reimbursement/subrogation" provisions;

5- properly resolving the ambiguity in Appellants' favor would deny the Plan any reimbursement.

6- the Plan limited its coverage by the subrogation provisions but these provisions were not set forth in clear language readily understood by the average purchaser of insurance.

7- Appellees did not give Appellants proper notice of the terms and limitations of the policy.

8- the Plan itself was not the Appellants' "insurance contract." That is, Appellants signed the "Enrollment Form" which mentioned the PEHP's Master Policy but in violation of **U.C.A. 31A-21-106** and ***Cullum v. Farmers,*** 857 P.2d 922 [Utah 1993] did not have the policy attached .

9- the Appellants did not make a known waiver of their "made whole" doctrine rights.

And,

10- the subrogation provisions were unenforceable because:

- because many operative, material terms were not defined.
- were hidden deeply in the policy.
- became operative automatically.
- would give the PEHP a "double recovery."
- violated Utah's case law holdings of the "reasonable expectations" doctrine.
- violated Utah's "common fund" doctrine. And because,
- to enforce them would cause Appellants' grave financial injury.

Though these were the many issues place before him, the Hearing Officer did not address any of them save one, i.e., Appellees' standing to bring its Request for Declaratory Judgment. On this one issue he did decide, however, the statute he adopted to support his position does not support his finding.

Notwithstanding these many documented disputes over material facts, the Hearing Officer summarily concluded that:

> *I found that the facts pleaded and relied upon by the Petitioner are true and uncontested.* **Record,** @ 334

But the record is barren of any reasoning as to ***how*** or ***why*** he found all of the above facts "uncontested." The mandates of the law require him to make findings on all material issues presented to him. He failed to do so requiring reversal of his grant of summary judgment. Additionally, he did not make any legal conclusions as he was required to do so under the many issues put before him for resolution. This failure also requires reversal of his Order.

No. 2- Did the Hearing Officer err when he did not consider Appellants' arguments that all the facts needed to be viewed [or understood] from the contentions and consequences of those facts.

Given the Appellants challenged Appellees' "Undisputed Disputed Facts" and presented several more facts that were "in issue" and that controverted or explained the consequences of Appellees' facts, the Hearing Officer did not consider Appellants' facts nor view said facts in a light favorable to Appellants. That is, for the Hearing Officer to have held that:

> *I found that the facts pleaded and relied upon by the Petitioner are true and uncontested.* **Record,** @ 334

clearly shows he did not consider that the facts he did find *"uncontested"* can still be in dispute if the parties disagree on the understandings, contentions, and

consequences of those facts. Since the parties debate a major difference in the understanding, contentions and consequences of the facts, e.g.:

A- Appellants' "reasonable expectations" in purchasing insurance vs. paying their insurer back for coverage they paid for.

B- Appellees contending that Appellants are bound by an insurance policy never presented to them.

C- Appellees contending that Appellants are bound to material terms in an insurance policy that are not defined in the policy and were never explained.

D- Appellees contending that the insurance contract legal incorporated by reference the 75 page, Master Policy which was not attached to the Enrollment Form contract.

And,

E- Appellees contending that Appellants knowingly waived their "Made Whole" doctrine rights.

Obviously, the legal ramifications surrounding each of these five contests, creates "material factual disputes" precluding summary judgment.

No. 3- Did the Hearing Officer err in granting summary judgment in not viewing the facts in a light most favorable to Appellants?

In not finding any "contested" facts, it is apparent the Hearing Officer did not view the Appellants' facts, nor the reasonable inferences stemming from their facts, in a light most favorable to Appellants. But legally, he was required to do so. In

failing to do so, and from that failure to summarily conclude there are no material factual disputes is manifest error requiring the vacation of his grant of summary judgment.

No. 4- Did the Hearing Officer err in finding Appellees had standing to bring its Request for Declaratory Judgment?

The only finding the Hearing Officer made was that he found Appellees had standing to bring its Request for Declaratory Judgment. But he did not justify this finding by memorializing any support in fact or law. He did however, adopt Appellee's counsel's reference to **U.C.A., 49-11-613.**

But a closer look at this statute shows it does not support the finding that the Board and/or PEHP had authority/standing to bring the Request for Declaratory Judgment. Under the relevant law, only a "person" has standing to bring a declaratory action. Appellees are not persons but they are "things."

Interestingly, the Retirement Board and/or PEHP requested a review by a hearing officer all the while sidestepping the pre-requisite request for an initial ruling from the executive director. And they did this without any authority, without any standing to bring the Request for Declaratory Judgment they did bring.

Clearly, the statute does not confer authority upon the Board or the Plan to bring a declaratory action. Yet, it is the statute the Hearing Officer adopted and relied upon to support his legal conclusion. But when the legal conclusion relied upon does not stand for the proposition proffered, it cannot survive appellate review.

Appellants assert that under **U. C. A., 49-11-613,** Appellees lack standing to bring the underlying Request for Declaratory Judgment. This statute defines those who are permitted to bring an action hereunder. PEHP is not mentioned as a person or entity entitled to bring an action before a hearing officer or the Board.

Appellees have no standing to have brought these proceedings and in so bringing them the Request is invalid and must be rejected. While the legislature could have conferred upon the Board or the Plan authority to bring an action like this, it did not do so.

****

A R G U M E N T S-

MARSHALING EVIDENCE-

Generally, a party must marshal all the evidence in favor of the challenged judgment/findings and then go forward showing just why the marshaled evidence is legally insufficient to sustain the judgment/verdict. But this base root of appellate advocacy is not without exception. The operative laws state that if the trial court's findings are legally insufficient, an appellant need not engage in a futile marshalling of [insufficiently detailed] evidence. The appellate courts say that if the trial court's findings are so insufficient that they fail to disclose the evidentiary basis for the trial court's findings they fail to provide enough information for a meaningful review by the appellate court. When the trial court's findings are inadequate for a meaningful understanding by the appellate court, appellant need only show the court's findings as legal insufficient. ***Campbell v. Campbell,*** 896 P.2d 635, 639 [Ut. Ct. App., 1995]; ***Woodward v. Fazzio,*** 823 P.2d 474, 477 [Ut. Ct. App., 1991]

Appellants assert there are no administrative court findings on all of the factual and legal issues that were before it and that the Findings of Fact and Conclusions of Law and Order made is so totally barren of any basic information that a party cannot track any of the factual or evidentiary findings that underpin the grant of summary judgment. In being totally void of the basic facts and legal reasoning

behind the grant of summary judgment, one simply cannot marshaling absent evidence.

Appellants attack the administrative court's ruling on its failure to present the necessary information for a proper appellate review There is one issue the Hearing Officer did address and under that dispute he has offered a finding based upon some recited legal foundation, Appellants have marshal the evidence on that single dispute.

****

No. 1- **Did the Hearing Officer err in granting summary judgment by not setting forth the reasons supporting his grant of summary judgment?**

Did he err in not finding any disputed issues of material fact from the many factual disputes Appellants presented to him?

Did he err in not offering any legal authority to support his grant of summary judgment?

Appellants disputed, material, operative facts included that the subrogation policy provisions were unenforceable because they:

A- **were ambiguous** in failing to define several material, technical, operative terms and that the law requires all ambiguities to be resolved against Appellees as the contract drafter and in Appellants' favor.

Record, @ 92, 94-97, 104-106, 275-278, 279-282, Hearing Transcript @ 347, pages 9-10, & 12-15.

While the Policy admits to the absence of these material definitions, and Appellees have agreed that to omit terms in a contract makes the contract ambiguous, the Hearing Officer still ignored the issue. **Record,** @ 277 & 281, 295 & 299, Hearing Transcript, @ page 15.

Continuing, the subrogation policy provisions are unenforceable because they:

B- **were not set forth in clear language** readily understandable by the average purchaser of insurance.

Record, @ 93-96, 104, 276-278, 280-283, Hearing Transcript @ 347, pages 10, 12-15, & 17.

C- were contained in the Plan/policy that **Appellees never presented or explained to Appellants.**

Record, @ 92, 96-97, 104-106, 272-273, 279, 281, 286-288, Hearing Transcript @ 347, pages 9-10

D- were **invalidly incorporated by reference into the Enrollment Form,** the Appellants' insurance contract with Appellees.

Record, @ 103, 104, 272-274, 276, 284, 286-288, Hearing Transcript @ 347, pages 9-10.
See also **Record,** @ 7 & 86 [Appellees' **Exhibits "A" & "B"]**

E- **were contained in an adhesion contract.**

Record, @ 96, 195, 276, Hearing Transcript @ 347, pages 12-13 & 17.

F- **were hidden deeply in the policy.**
Record, @ 21-22, 104, 279.

And,

G- **became operative automatically.**
Record, @ 21, 100, 104, 279, Hearing Transcript, @ page 3]

Appellants further argued that Appellees:

H- **had no standing** to bring its Petition for a Declaratory Judgment.
Record, @ 284, Hearing Transcript @ 347, pages 8-11

I- should have been required to **show that Appellant Rose Kramer was "made whole"** by her settlements.

Record, 93-94, 97-99, 104, 282, Hearing Transcript @ 347, pages 15-16.

J- **could not show that Appellants knowingly waived** their "made whole" doctrine rights.

Record, 98, 101, @ 283, Hearing Transcript @ 347, pages 11-12, & 17.

K- **had not given Appellants proper notice** of the policy's terms and limitations.

Record, @ 272-273, 284, 286-288, Hearing Transcript @ 347, pages 12-13.

And finally that:

L- to enforce the subrogation provisions would result in:

a- **a violation of Utah's "common fund" doctrine.**
Record, @ 102-104, 283, Hearing Transcript @ 347, pages 13-14.

b- **a violation of the Appellants' "reasonable expectations."**
Record, @ 281-282, 286-288, Hearing Transcript @ 347, page 16.

c- **Appellees receiving a "double recovery."**
Record, 101-102, 104, 276, 278, 279, 283, 289, Hearing Transcript @ 347, pages 13-14.

And,

d- **Appellants suffering a grave financial injustice.**
Record, @ 105, 283-284

Notwithstanding that all of these issues were before the Hearing Officer and that Appellants specifically asked him to decide each one, **[Record,** @ 326, 330] he "summarily" found no genuine issues of material fact existed on any of the above proffered material, factual disputes.

[Note: The Hearing Officer did find that Appellee's standing to bring the Petition, but he made this conclusion without offering **why** he believed this and the legal authority cited does not support his finding. **Record,** @ 338 Accordingly this "stand alone" finding and conclusion is likewise fatally defective. See argument, infra.]

In his 08/22/07, "Finding of Fact and Conclusions of Law and Order on Summary Judgment" eleven "Findings of Fact" are noted. But none of these eleven "facts"

are the Hearing Officer's own findings of fact. That is, none of these "facts" are found in his 07/30/07 Ruling. This Ruling states only:

1- The Petitioner's Motion for Summary Judgment is granted.

.....

4- Counsel for Petitioner is directed to prepare an appropriate Order in conformity with this Ruling.

Record, @ 322

In his 08/20/07 letter directive, he found only that **1-** Appellees have standing and, **2-** the subrogation clause is legally enforceable. **Record,** @ 334

But the subsequent, 08/22/07, "Findings of Fact and Conclusions of Law and Order on Motion for Summary Judgment" then goes on to conveniently add several "facts" well beyond the 07/30/07 Ruling. Petitioner's counsel drafted this "Order."

> *.... I provided the facts from the Memorandum in Support of the Motion for Summary Judgment in the proposed order.*
>
> Appellee's Counsel's letter to Hearing Officer**, Record,**@ 328

Additionally, the "Conclusions of Law" set forth in this document, are likewise both self-serving and totally absent any supporting "findings of fact" or legal authority. There is no evidence that the "conclusions" set forth in the 08/22/07, "Findings, Conclusions and Order" were made by the Hearing Officer. **Record,** @ 322

The Conclusions of Law set forth therein state:

1- Petitioner has standing to bring this action against Respondents pursuant to Utah Code Annotated, 49-11-613.

[No further reasoning nor any factual findings supporting this conclusion are offered.]

2- The contractual subrogation clause in the PEHP Master Policy is legally enforceable.

[No reasoning whatsoever in fact or law is offered to support this conclusion.]

3- Petitioner is entitled to summary judgment as a matter of law because there is no genuine issue as to any material fact.

[This conclusion is made without the hearing officer having decided or even commented upon the many disputed factual issues Appellants had put before him.]

4- The plain language of the PEHP Master Policy requires PEHP to be reimbursed $30,047.45.....

[No further reasoning nor any factual findings supporting this conclusion are offered. One cannot learn *how* or *why* the Hearing Officer found the language so clear. But again, these are Appellees' counsel's conclusion and not the Hearing Officer's.] **Record,** @ 338

While Appellants had set forth multiple, contested, material issues, the Hearing Officer did not make any findings on any of them. He did however, adopt Appellees' counsel's finding on the 08/22/07 Order. Appellants' counsel formally objected to this approach to both the Hearing Officer and Appellees' counsel on two occasions. **Record,** @ 326, & 330. Yet, the Hearing Officer failed to address the Appellants' objections and simply adopted the Appellees' positions without offering any facts or legal conclusions to support his adopted positions.

Appellants believe this Court must reverse the grant of summary judgment because the paucity of the Hearing Officer's factual findings and legal conclusions are manifestly insufficient to support the Order.

The Hearing Officer adopted the Appellees' positions when he had Appellees' counsel draft the 08/22/07, Findings of Fact, Conclusions of Law and Order. Then counsel took liberties in adding facts and declaring conclusions of law. But to merely adopt a party's position is not proper.

> *It is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless the findings are waived... The discretion of adopting the findings*

as submitted to the trial court is exclusively in that court as long as the findings are not clearly contrary to the evidence.

> ***Boyer Co., v, Lignell***, 567 P.2d 1112, 1113-1114; [Utah, 1977] ***State v. All Real Property***, 37 P.3d 276, 279; [Utah Ct. App., 2001]

In contradiction to the ***Boyer*** and ***State*** advice, here we find that:

A- the Hearing Officer did not find any facts on the many of the issues submitted to him; and that,

B- without such factual findings one cannot argue whether they are in conformity with, or in contradiction to, the evidence and/or the law.

The dictates of ***Boyer*** and ***State*** say that "adoption" is permitted but only when the *"findings are not clearly contrary to the evidence."* To inquire into the question if the findings here are in conformity to the evidence, one looks to Ruling or Order. In ***Aurora Credit Services v. Liberty West Development***, 970 P.2d 1273, 1281-1282, [Utah, 1998] our Supreme Court reversed the trial court's denial of a request to amend a complaint because the trial court failed to state the reasons supporting the denial and because the reasons were not apparent from the Record. Instantly, our Record is barren of the administrative court's reasons to grant summary judgment.

Without having the service of the Hearing Officer's reasoning in arriving at his decision, one cannot compare his findings against the evidence. In consequence thereto, under ***Aurora,*** this appellate court needs to reverse the grant of summary judgment.

Moreover, for the Appellees' counsel's facts and conclusions of law that the Hearing Officer did adopt, the Hearing Officer then failed to support the adopted facts and conclusions with his reasoning processes or the legal authorities that led him to said adoption.

The Appellants have a right to the Hearing Officer's independent judgment.

> *We made clear that the findings of fact adopted by the court must be the result of the trial judge's independent judgment.*
> .....
>
> *Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic.....*

There is, however, an additional reason why a reversal and remand is the appropriate remedy in this case. We made it clear that the linchpin in using findings of fact, even when they are verbatim adoptions of the parties' proposals, is evidence that they are the product of the trial court's independent judgment. ***PEDF****, 153 F.3d @222 In this case there is no record evidence which would allow us to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment. In fact, the procedure used by the District Court casts doubt on the possibility of such a conclusion.*

Bright v. Westmorland County, 380 F.3d 729, 731-732, [U.S.D.C., 3rd Cir., 2004]

The case at bench dishonors the principles of ***Bright*** in that:

A- There is no indication that the findings of fact the court adopted are the result of the Hearing Officer's independent judgment.

B- Both Appellants and this reviewing court have not a clue into the *logical and analytical explanations of why the* Hearing Officer *arrived at* [or adopted] *a specific decision.*

And,

C- There is no record evidence which would allow this reviewing court to conclude that the Hearing Officer conducted its own independent review or that his opinions is the product of his own judgment.

For the Hearing Officer to make such a governing conclusion in granting summary judgment and then deny the aggrieved party any inkling into the factual and legal reasoning behind the conclusion is universally held to be error. The trial court needs to properly rule on the issues presented to it. It must make "findings." Here the Record is silent. There is no indication of the reasoning underlying the Hearing Officer's rulings. When the record is silent in not providing the reasoning of *how* or *why* the court arrived at its findings, the findings cannot be upheld. This administrative court's rulings run contrary to the law's mandates under a long, clear, legal history. To wit:

> *Findings are adequate only if they are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."* [citation] [Like here] *in the instant case, the court failed to separate its findings of fact and conclusions of law in accordance with Rule 52a.* ***Campbell v. Campbell,*** 896 P.2d 635, 638-639 para 2 & 3 [Utah Ct. App., 1995].

The trial court's findings of fact ... were inadequate, where most of the "findings" were conclusionary and more akin to conclusions of law, and provided no insight into the evidentiary basis for the trial's court decision. ***Woodward v. Fazzio***, 823 P.2d 474, 479 para 6 [Ut. Ct. App., 1991]

Because the trial court's finding is devoid of any analysis concerning the statutory criteria ..... the finding cannot be upheld. It was error to [make conclusion] ....without applying the statutory standard for making such a determination. See ***Young v. Young***, 979 P.2d 338, 345 para 26 [Utah, 1999].

Like in ***Young***, because we don't know what statutory standard the court used in making its determination, the conclusion is legal error. This finds the Hearing Officer's foundationless conclusions fatally defective to the grant of summary judgment.

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." The findings of fact must show that the court's judgment or decree "follows logically from and is supported by, the evidence."

The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. ***State v. Real Property - 633 East 640 North***, 942 P.2d 925, 931, para 9 [Utah, 1997]

The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to resolution of dispute under proper rule of law. To that end findings of fact should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which ultimate conclusion on each factual issue was reached. The rule as stated in ***Prows v. Hawley,*** 271 P. 31[Utah, 1928] *is that: until the court has found on all the material issues raised by the pleadings, the findings are insufficient to support a judgment; and that findings should be sufficiently distinct and certain as not to require an investigation or review to determine what issues are decided.* ***Rucker v. Dalton,*** 598 P.2d 1316, 1338-1339, para 2 [Utah, 1979].

Under each of the above issues, there are no conclusions of law nor supportive findings of fact explaining ***how*** and ***why*** the court reached its decision. The Hearing Officer summary declared: *I found that the facts pleaded and relied upon by the Petitioner are true and uncontested.* **Record,** @ 334 The Hearing Officer

did not address the material, disputed issues before him. Notwithstanding the many factual disputes Appellant argued, he found the facts "uncontested." Accordingly, the court must reverse his Ruling and the "Findings of Fact, Conclusions of Law and Order," he did make for being fatally defective in their gross absence of mandated information.

This grant of summary judgment is wrong:

> *... because the party against whom a summary judgment is deprived of the privilege of a trial, the record must be carefully scrutinized to see if that party presents allegations which, if true, would entitle him to judgment, if so, then summary judgment is improper.*
>
> ***Rich v. McGovern***, 551 P.2d 1266 [Utah, 1976]

Rich required the Hearing Officer to find the Appellants' factual disputes and legal conclusions *false* and that other reasonable minds would also so find. The Hearing Officer did not follow the ***Rich*** analysis.

Further,

> *unless there is a showing that the disfavored parties cannot produce evidence that would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous.*

Bridge v. Backman, 353 P.2d 909, 910 [Utah, 1990]; ***Krantz v. Holt,*** 819 P.2d 352, 356 [Utah, 1991]

Neither the Hearing Officer nor Appellees showed or even suggested that Appellants *cannot produce evidence that would reasonably support a finding in their favor on a material or determinative issue of fact.* Thus, the grant of summary judgment was error.

The Utah State Retirement and Insurance Benefit Act-

The specific authority this Hearing Officer acts under is the **Utah State Retirement and Insurance Benefit Act. [U.C.A. 49-11-101, et seq.]** This Act has specific directives that a hearing officer shall follow in adjudicating claims. In this instance, the Hearing Officer ignored the mandates on the exercise of his authority under the Act. **U.C.A., Section 49-11-613** address the responsibilities of a State Retirement Board hearing officer. In pertinent part it states:

c- hear and determine all facts pertaining to application for benefits under any system plan.....

d- make conclusions of law in determining the person's rights under any system, plan....

The Hearing Officer acted in disregard of the Acts' specific mandates permitting him to adjudicate claims: **1-** in not determining any facts, and **2-** in not making

relevant conclusions of law. To disregard the mandates of one's judicial calling is to render their findings invalid. Had the Hearing Officer followed the dictates of the law and of the position he holds under the State Retirement Act, he would have found material, factual disputes precluding the grant of summary judgment. ***Bill Brown Realty v. Abbott,*** 652 P.2d 238 [Utah, 1977].

****

No. 2- Did the Hearing Officer err when he did not consider that all the facts needed to be viewed and understood from the contentions and consequences of those facts?

Appellants did not dispute certain facts but asserted that the meanings, understanding, intentions and consequences of those facts created factual and legal disputes precluding summary judgment. **Record,** @ 272-279, Hearing Transcript @ page 16.

Appellants voiced strong opposition to the Appellees' Statement of Facts contesting the context that Appellees offered those facts. To wit:

A- that Mr. Kramer's enrolled in the PEHP and signed the Enrollment Form.

B- that by signing the Enrollment Form, Appellants agreed to the terms and conditions of the PEHP Master Policy.

And,

C- that the subrogation provisions of the PEHP are controlling.

Appellants argued that since Appellees never gave a copy of the Plan to Appellants or explained it to them, **[Record,** @ 272, 285, 286] and because the failure of the Plan itself to define operative, material terms that notwithstanding enrolling and signing the Enrollment Form, the Plans' subrogation provisions were not enforceable against them. **Record,** @ 272-275, Hearing Transcript @ pages 9-10, 12 & 15.

Appellants further argued that the Plan's subrogation provisions were not controlling or enforceable because they:

a- were **ambiguous;**

b- since the ambiguities were in an **adhesion contract**, they would be resolved in Appellants' favor;

c- were against **public policy;**

d- violated the Appellants' **"reasonable expectations;"**

e- violated Utah's **"common fund"** doctrine;

f- violated Utah's **"made whole"** doctrine;

g- were **hidden deeply** in the policy;

and,

h- became **operative automatically**. **Record,** @ 275- 276, 279.

Finally, Appellants argued that **1-** if the subrogation provisions were enforced Appellees would gain a "double recovery" in receiving both the Appellants' insurance premium dollars together with the subrogation reimbursement monies and that, **2-** to enforce the subrogation provisions would result in a unjust, inequitable result in causing Appellants to suffer a dear, financial injury. **Record,** @ 279, Hearing Transcript @ page 13.

Should a trier of fact find any of these facts in Appellants' favor, then the legal ramification of so finding would render the subrogation provisions unenforceable.

Moreover, there is a legal directive holding that material, factual disputes can arise from the differences in the understandings, intentions, and consequences of undisputed facts.

> *When the parties were not in complete conflict as to certain facts, but the understanding, intention, and consequences of those facts were vigorously disputed, the matter was not proper for summary judgment and* ***could only be resolved by trial.***
>
> ***Sandberg v. Klein,*** 576 P.2d 1291, 1292 [Utah, 1978]

When one cross references an undisputed fact against a party's different understanding, intention or consequences of that fact, the byproduct is a legal, material, factual disputes, For example:

A- by signing the Enrollment Form, did Appellants agreed to the terms and conditions of the PEHP Master Policy? Not necessarily when:

1- operative technical terms are not defined/ever explained, and when Appellants were not given a copy of the Plan. Understandably, one cannot *knowingly* agree to unknown/undefined material terms.

Or,

B- are the subrogation provisions of the PEHP controlling? Not necessarily when:

1- those provisions are invalid under Utah law for being ambiguous and against public policy, and for being in violation Utah's "made whole" and "common fund" doctrines, and because they repudiate the Appellants' "reasonable expectations."

Each of the issues Appellants proffered against the Appellees' demand for reimbursement constitutes a material, factual or legal dispute. To wit:

The law requires that:

1- if the policy is **ambiguous** because of undefined material terms then the subrogation provisions are not enforceable.

"A policy may be ambiguous if it is unclear or omits terms." ***Falkner v. Farnsworth***, 665 P.2d 1292, 1293 [UT 1983]; ***Quaid v. U.S. Healthcare***, Ad. Rep., 2007 [Utah] 27, The PEHP omits terms and is unclear. If a

layperson could not/would not understand the term(s), it is incumbent upon PEHP, the contract drafter, to explain the term(s) in understandable, lay language. See ***McCoy v. Blue Cross – Blue Shield***, 980 P.2d 694, (UT App. 1999). To fail to explain the operative, material terms is to lose the right to enforce said terms.

2- if the policy's limitations were not set forth in clear language readily understandable by the average purchaser of insurance, the subrogation provisions are not enforceable.

See ***Allstate v. Worthington***, 46 F.3d 1005, [10th Cir. 1995] quoting, ***Draughton v. CUNA Mut. Ins. Soc'y***, 771 P.2d 1105, 1108 [Utah App. 1989]; ***U. S. Fidelity v. Sandt***, 854 P.2d, 519, 524 [Utah, 1993] which hold that limitations/exclusions on insurance coverage must be effected with language that clearly identifies the scope of the limitation to the reasonable purchaser of insurance. When the limitations are left undefined, they are not clearly identified to the reasonable purchaser of insurance.

3- If Appellees did not have standing to bring its Request for a Declaratory Judgment, their claim must be dismissed with prejudice.

The two governing statutes, **UCA 49-11-613** and **49-20-401(e)** finds PEHP a "program" and programs can only **"process claims."** Suing insureds for subrogation claims is not "processing claims."

4- The law requires Appellees to show that Appellants Rose Kramer was **"made whole"** by her settlements.

See ***Hill v. St. Farm***, 765 P.2d 864, (1988) requiring the insurer to prove their insured has been made whole by their settlement before any subrogation rights can take effect. Likewise, **U.C.A. 49-11-613(4)** imposes upon Appellees this same burden or proof.

5- if Appellees never presented a copy of the PEHP Master Policy to Appellants then it is not enforceable.

See ***Farmers Ins. Exchange v. Call***, 712 P.2d 131, [Utah, 1985] which found certain exclusion unenforceable because Farmers failed to furnish the policy containing the exclusions to its' insured.

6- if the PEHP's subrogation provisions violated Utah's **"common fund"** doctrine then the provisions are not enforceable.

See ***Barker v. UT Public Serv. Comm.***, 970 P.2d 702, 711 (UT., 1998) and, ***Stewart v. UT Public Serv. Comm.***, 885 P.2d 759 (UT. 1994) holding that

those with valid/enforceable subrogation rights must contribute a fair share of the total fees and costs incurred by the plaintiff in securing the settlement fund monies.

7- the law requires Appellees to show Appellants knowingly waived their **"made whole"** doctrine rights. Absent the showing and Appellees cannot enforce the subrogation provisions against Appellants.

U.C.A. 49-11-613(4) imposes upon Appellees this burden or proof. The made whole doctrine can be modified by contract, but in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from a third party tortfeasor. Where the insured settles with the tortfeasor, the settlement amount goes to the insured unless the insurer can prove that the insured has already received full compensation. ***Hill v. St. Farm***, 765 P.2d 864, 867 [2 & 3](1988).

8- If the PEHP Master Policy was not attached to the Enrollment Form, the the insurance contract, but was only **incorporated by reference** then it is not enforceable against Appellants. **Record,** @ Hearing Transcript @ pages 9-10.

U. C. A., 31A-21-106(1) states that one cannot incorporate by reference any provision in an insurance policy unless the provision is set forth at length therein. See also ***Cullum v. Farmers***, 857 P.2d 992 [Utah, 1993] for this same prohibition.

9- If PEHP had not given Appellants proper notice of the policy's terms and limitations, then the terms are not enforceable against Appellants.

When an insurer wants its insured to be bound by a policy provision, it needs to show that the insured has had the opportunity to review the insurance contract. ***McCoy v. Blue Cross – Blue Shield***, 980 P.2d 694, 699. The insurer is required to strictly comply with all the provisions that give an insured notice of the terms, conditions, limitations, or changes to an insurance policy. ***McCoy***, supra, @ 695-696 An insured cannot have "notice" of "terms, conditions or limitations" not defined, nor understood by merely "being referred to" in the insurance contract.

10- If, to enforce the subrogation provision would result in Appellees receiving a **"double recovery."**

Appellees would receive a double recovery in that it received Appellants' premium dollars for coverage of medical bills. It pays those medical bills

and now wants 100% reimbursement of the dollars for the medical bills it did pay. This is wrong and visits a grave, financial injustice to Appellants.

11- If, to enforce the subrogation provisions would result in a violation of Appellants' **"reasonable expectations"** the provisions will not be enforced.

Provisions that are against public policy or against the reasonable expectations of the parties may be found void in appropriate circumstances. ***Wagner v. Farmers Insurance***, 786 P.2d 763, 766-767 [Utah Ct. App., 1990]

12- Since the subrogation **provisions are hidden deeply in the policy**, they are not enforceable.

When provisions are hidden in a contract/policy and not brought to the attention of the buyer the court will not enforce those provisions against the buyer. In ***Christopher v. Larson Ford***, 557 P.2d 1009, 1012 [Utah, 1976] the court found a warranty disclaimer invalid because it was "hidden" and not brought to the attention of the buyer: the law looks with disfavor upon semi-concealed or obscured self-protective provisions of a contract prepared by one party, which the other is not likely to notice. **Id**. @ 1012 See also ***Bornhart v. Civil Service***, 398 P.2d 873, 877 [Utah 1976].

And,

13- If, to enforce the subrogation provisions would result in Appellants suffering a grave financial injury, the provisions should not be enforced.

Subrogation is not a matter of right but may be invoked only in circumstances where justice demands its application. Subrogation must not work any injustice to the rights of others. ***Transamerica Ins. v. Barnes***, 505 P.2d 783, 786 [Utah, 1972]; ***St. Farm v. Northwest Nat'l Ins.***, 912 P.2d 983, 986 (Utah 1996).

Had the Hearing Officer viewed Appellants' arguments under the dictates of ***Sandberg***, supra, he would have found several disputed, material factual issues precluding summary judgment. In failing/refusing to follow the mandates of the law, his Order must be reversed.

****

No. 3- Did the Hearing Officer err in not viewing the facts and all reasonable inferences therefrom in a light most favorable to Appellants?

In this instance, the Hearing Officer made his findings in a blatant disregard for the "facts" set forth by Appellants. This is wrong.

Non-Moving Party's Facts Are Deemed To Control Disputes-

A basic foundation of all determinations on Rule 56 motions is that the court is to view all the factual allegations in a light most favorable to the non-moving party.

> *On review of a summary judgment motion, the party against whom the judgment has been granted is entitled to have all the facts presented, and all inferences fairly arising therefrom, considered in a light most favorable to him.*
>
> ***Morris v. Farnsworth Motel,*** 259 P.2d 297, 299 [1&2][Utah, 1953]; ***Mountain States Tel. & Tel. v. Garfield County,*** 811 P. 2d 184, 193 [Utah, 1991]; **U. R. C. P. 56 (c).**

> *In determining whether the trial court correctly found that there were no genuine issues of material fact, the appellate court reviews the fact and all reasonable inferences in a light most favorable to the party opposing the motion. It reviews the trial court's conclusions of law for correctness, including its conclusion that there are no material fact issues.*
>
> ***Neiderhauser Bldrs & Dev. v. Campbell,*** 824 P.2d 1193, 1196, [Utah Ct. App., 1992]

Instantly, the Hearing Officer sided with the Appellees' factual contentions: *I found that the facts pleaded and relied upon by the Petitioner are true and*

uncontested. No reasoning **why** he found this was offered. **Record,** @ 334 But to follow the mandates of the law required the Hearing Officer to accept the Appellants' factual allegations they had set forth in a light most favorable to them. When the Hearing Officer adopted the Appellees' positions, and when he proffered no reasoning as to *how* and *why* he found no facts in contest, his silence proves to the reviewing court that he did not view the Appellants' facts and the fair inferences arising from those facts in a light most favorable to them. If the Hearing Officer had followed the law, the many conspicuous, factual disputes would have precluded the grant of summary judgment.

****

No. 4- Did the Hearing Officer err in finding Appellees had standing to bring its Request for Declaratory Judgment?

The only finding the Hearing Officer made was that he found Appellees had standing to bring its Request for Declaratory Judgment. But he did not justify this finding by memorializing any support in fact or law. He did however, adopt Appellee's counsel's referenced to **U.C.A., 49-11-613 [**entitled, **"Appeal procedure – Right to appeal hearing officer –Board reconsideration – Judicial review"** of the **Utah State Retirement and Insurance Benefit Act].**

But a closer look at this statute shows it does not support the finding that the Board and/or PEHP had authority/standing to bring the Request for Declaratory Judgment.

In pertinent parts this statute declares:

> **b-** Any dispute regarding a benefit, right, obligation, or employment right under this title is subject to the procedures provided under this section.
>
> **c-** ***A person*** who disputes a benefit, right, obligation or employment right under this title shall request a ruling by the executive director.
>
> **d-** ***A person*** who is dissatisfied by a ruling of the executive director with respect to any benefit, right, obligation or employment right under this title shall request a review of that claim by a hearing officer.
>
> [In this instance, Appellants believe **subsections b, c,** and **d,** are operative clauses and does not directly challenge them.]

Section 49-11-102 entitled "Definitions" of this ***Act*** offers definitions of the terms used within the ***Act.*** It does not define ***"a person".*** But interestingly, ***The American Heritage Dictionary of the English Language – New College Edition*** of 1979 does define a ***"person"*** as:

> *A living human being, especially as distinguished from an animal or thing.*

Surely, the State Retirement Board and the PEHP are *things*.

Just as surely, Appellants are "persons" and are specially empowered under **Subections c & d** above to:

1- request a ruling by the executive direction,
And if dissatisfied with the ruling to

2- request a review of that claim by a hearing officer.

Appellants did not request a ruling from the executive director nor request a review of any ruling by a hearing officer.

The Retirement Board and/or PEHP requested a review by a hearing officer all the while sidestepping the pre-requisite request for an initial ruling from the executive director. And they did this without any authority, without any standing to bring the Request for Declaratory Judgment they did bring.

Clearly, the statute does not confer authority upon the Board or the Plan to bring a declaratory action. Yet, it is the statute the Hearing Officer adopted and relied upon to support his legal conclusion. But when the legal conclusion relied upon does not stand for the proposition proffered, it cannot survive appellate review.

Appellants assert that under **U. C. A., 49-11-613,** Appellees lack standing to bring the underlying Request for Declaratory Judgment. This statute defines those who are permitted to bring an action under **Utah State Retirement and Insurance Benefit Act**. PEHP is not mentioned as a person or entity entitled to bring an

action before a hearing officer or the Board. Members can. Under **U. C. A. 49-11-613** PEHP is a "program" and programs have limited rights. "Programs" can only "process claims." **UCA 49-20-401(e)** Seeking to enforce subrogation rights is not "processing a claim." Subrogation rights are not a dispute encompassed within the parameters of **Title 49.**

Additionally, **UCA 49-11-301(3)** says the assets of the fund [program benefit monies] are for the exclusive benefit of the members and *"may not be diverted or appropriated for any purpose other than that permitted under this title."* Appellees' demand for payback from a "member" is *diverting or appropriating monies not permitted under the title.*

Appellees have no standing to have brought these proceedings and in so bringing them the Request is invalid and must be rejected. While the legislature could have conferred upon the Board or the Plan authority to bring an action like this, it did not do so. And in remaining silent, one is required to admit that if the legislature could have conferred such authority and chose not to, then in "choosing not to" was an intentional, legislative decision and not an oversight. *"Each term in a statute was used advisedly".* ***Harmon City v. Nielson & Senior,*** 907 P.2d 1162, 1168 [Utah, 1995]; ***Neel v. State***, 889 P.2d 922,926 [Utah, 1995].

****

C O N C L U S I ON-

Though specifically requested to do so, and legally required to do so, the Hearing Officer failed to set forth the reasons supporting his grant of summary judgment. He did this notwithstanding the several questions before him. **Record,** @ 326, 330, 334 That failure causes Appellants great difficulty in attacking the grant of summary judgment on specific grounds. All of the subrogation terms of this insurance contract are in contest as concerns:

- what the terms are and what they mean?
- if the are enforceable or not and why?
- does extrinsic evidence influence this dispute and how, and to what extent?

and,

- does public policy influence this dispute and how, and to what extent?

These questions compel the reversal of the grant of summary judgment. In ***Colonial Leasing v. Larsen Bros. Const.,*** 731 P.2d 483 [Utah, 1986], the court addressed this type of contract dispute. It said:

> *If the evidence as to the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement is* ***to be determined by a jury****.*

Black letter law holds that:

> *A summary judgment motion should be granted only when all the facts entitling the moving party to a judgment are clearly established or admitted.* ***Sorenson v. Beers***, 585 P.2d 458 [Utah, 1978]

And it should only be granted when the *showing precludes, as a matter of law, all reasonable possibility that the losing party could win if given a trial.* ***Frederick May Co. v. Dunn***, 368 P.2d 266 [Utah, 1962]; ***Judkins v. Toone***, 492 P.2d 980 [Utah, 1972]

The Hearing Officer did not *establish* the facts Appellees needed to prevail. Nor, *does his Order show* [or suggest or even rumor] *that Appellants could not win if given a trial.* He summarily adopted and concluded there were no disputed material facts. This conclusion is contrary to the ocean of legal mandates and factual evidence before him, as the law required specific findings of fact to support all legal conclusions.

> *The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to resolution of dispute under proper rule of law. To that end findings of fact should be sufficiently detailed and include enough subsidiary facts to disclose*

the steps by which ultimate conclusion on each factual issue was reached. ***Rucker v. Dalton***, 598 P.2d 1316, 1338-1339 [Utah, 1979]

Findings are adequate only if they are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." ***Campbell,*** supra, @ 638-639.

Instantly, the trial court abused its discretion in failing to state reason for its grant of summary judgment and the reasons for the grant were not apparent from the Record. Thus, the grant is legal error. ***Aurora,*** supra @ 1281-1282

For the many reasoned arguments set forth hereinabove, this Court properly should reverse the administrative court's grant of summary judgment and if Appellees had no authority to bring their Request for Declaratory Judgment, this Court should dismiss their Request with prejudice.

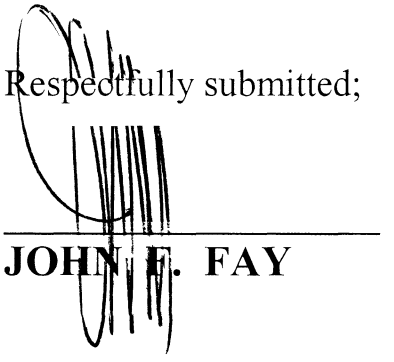
****

Alternatively, this Court should vacate the grant of summary judgment giving Appellants the opportunity to fully present their defenses. The Appellees will have ample opportunity to fully prosecute their claims through the regular processing of their action.

****

Date: 25, January 2008

Respectfully submitted;



JOHN F. FAY

PROOF OF SERVICE-

I certify that on this 25 day of January, 2008, I caused to be mailed, via first class mail, postage prepaid, a true and complete copy of:

APPELLANTS' OPENING BRIEF

to the following:

DAVID B. HANSEN
Howard, Phillips & Andersen
Suite 300
560 East 200 South
Salt Lake, UT 84102-2021

RICHARD C. HOWE
Utah State Retirement Bd.
560 East 200 South
Salt Lake, UT 84102-2021

[2 copies]

Executed in Salt Lake this 25 day of January, 2008

JOHN F. FAY